IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-756

C. O. HANSON,
Petitioner,
v.
SHELL OIL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondent Shell Oil Company ("Shell") respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied. Shell received that Petition on December 3, 1976 and files this response because it contains numerous factual statements without record support, merely reargues positions rejected by two courts below, and erroneously contends that the decision below merits review. To the contrary, in unanimously affirming the trial court's decision in favor of Shell, the Court of Appeals established no new legal precedent and decided no factual question of importance to persons not parties to this case. Thus, there is no justification for Petitioner's request that a third trial be held to reconsider the purely factual arguments raised by the Petition which were twice resolved in favor of Respondent.

OPINIONS BELOW

The unanimous decision by the Ninth Circuit Court of Appeals is reported at 541 F.2d 1352 (9th Cir. 1976)

and is set forth in Appendix A hereto.[1] Petitioner did not seek a rehearing or suggest a rehearing *en banc*. Following the first of two lengthy jury trials held in this case, the Honorable James A. Walsh of the District of Arizona ordered a new trial and that opinion is set forth in Appendix B (B-1 - B-5). At the close of the second trial, the jury returned a verdict for Shell and Judge Walsh entered the judgment which is set forth in Appendix C (C-1 - C-2).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTION PRESENTED

Whether this Court should entertain review of a unanimous decision of the Court of Appeals wherein the appeals court applied the correct law and the Petition merely asks this Court to review factual questions having no ramifications beyond this particular case that have twice been resolved in favor of the Respondent.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions are set forth in Appendix D (D-1 - D-2).

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action instituted by C. O. Hanson ("Hanson"), who formerly operated independent brand service stations and a wholesale gasoline distribution business in Tucson, Arizona (R. 1).[2] Hanson went

[1] The panel consisted of Circuit Judges Duniway and Wright and Judge Lucas of the Central District of California. Judge Wright wrote a separate concurring opinion (A-20).

[2] For the Court's convenience, Respondent's abbreviations for record citations will conform to those used in the Petition. R.=Record on Appeal; Tr.=Transcript; PX=Plaintiff's [Hanson's] Exhibit; SX=Shell's Exhibit; I=First Trial and II=Second Trial.

out of business in July of 1966 and, as the Ninth Circuit found, "[l]ike many another loser in the competitive endeavor, he decided to try the antitrust laws as a means of shifting his losses to someone else" (A-3). On December 23, 1968, two and one-half years after closing his business, he brought suit against Gulf Oil Corporation ("Gulf"), Standard Oil Company of California ("Standard"), and Shell, alleging unlawful acquisitions in violation of § 7 of the Clayton Act, 15 U.S.C. § 18, price discriminations in violation of the Robinson-Patman Act, 15 U.S.C. § 13, vertical and horizontal restraints of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and attempting and conspiring to monopolize trade under § 2 of the Sherman Act, 15 U.S.C. § 2 (R. 9-18). Petitioner accused the defendants of acting, both alone and in concert, to lower gasoline prices in the Tucson area to a level which would force independent dealers, such as Hanson, out of business.

B. Proceedings in the District Court

On July 27, 1970, Judge Walsh entered a partial summary judgment in favor of all three defendants "as to all alleged violations of the antitrust laws occurring prior to December 23, 1964" (R. 78-79, 81, 88-89, 91), four years prior to the filing of the complaint. Petitioner never assigned error to this ruling in the Court of Appeals or in his Petition.

At the first of two trials, directed verdicts were entered for Shell and all other defendants on all of Hanson's claims except for those Sherman Act charges that Shell and Standard conspired to fix retail prices and to monopolize the sale of motor fuel in Tucson.[3] The first jury returned a verdict for Hanson and awarded untrebled damages of $363,181.31 (R. 291).

[3] According to the Court of Appeals ". . . the trial court's only possible error was its failure *to direct a verdict for Shell on all counts* at the close of the evidence." (A-15 n.8) (Emphasis supplied.)

In response to motions filed by Shell and Standard, the trial court ordered that a new trial be held on the two horizontal conspiracy issues that had been submitted to the first jury.[4] Judge Walsh found the verdict to be against the clear weight of the evidence, the damages awarded excessive, and substantial error to have been committed in the admission of certain evidence[5] (R. 964-969). At the new trial against Shell alone,[6] a jury found in favor of Shell (Tr. II, 4332).

C. Proceedings in the Court of Appeals

Hanson appealed the trial court's decision in favor of Shell by asserting error in: (1) the granting of the motion for a new trial; (2) the granting of directed verdicts for Shell on the Sherman Act vertical restraint and attempt to monopolize claims; (3) the trial court's instruction to the second jury concerning acts occurring before December 23, 1964; and (4) the rejection of certain evidence. The Court of Appeals affirmed the District Court's decision "in all respects" (A-19)[7] and the Ninth Circuit concluded:

[4] Judge Walsh's opinion on the new trial order is set forth in Appendix B.

[5] Among the evidence found to have been improperly admitted was PX 362-B which, according to Judge Walsh, represented "*contrary to the fact*, . . . that Plaintiff had derived very substantial profits, . . . , from his business in the year 1962" (B-1, B-2) (Emphasis supplied.)

[6] Although the verdict returned at the first trial, after trebling, would have approximated $1.1 million. Hanson settled with Standard for $50,000 (R. 1197). In accordance with his contingent fee arrangement, Petitioner's counsel received 50 percent of this amount, which, after deducting the expenses of this litigation, left Petitioner only $16,000 (R. 1197-98, 1206.).

[7] In upholding the directed verdict for Shell on the vertical price-fixing charge, the Court of Appeals noted that Hanson's own witnesses had testified that Shell applied no coercion to impose resale prices on its dealers (A-7, A-8). The trial record contained extensive testimony by Shell dealers which showed them to have determined their own prices based on their own business judgments (Tr. I, 403, 410-11, 816-17). Judge Duniway found that Hanson failed as a matter of law to demonstrate the specific intent necessary to support his attempt to monopolize claim (A-11). Since "[t]he Sherman Act is not a subsidy for inefficiency" (*id.*), the Court of Appeals refused to permit consumers to be penalized "so that less efficient competitors can stay in business" (*id.*). Judge Walsh's new trial order on the claimed Shell-Standard conspiracy was upheld by the appeals court which found the "scant evidence" offered by Hanson on this claim "outweighed by the massive amounts of evidence introduced to show that Shell and Standard were active competitors, not conspirators" (A-14).

> . . . Hanson's showing was so insubstantial that the trial court's only possible error was its failure to direct a verdict for Shell on all counts at the close of the evidence (A-15 n.8).

Hanson's Petition only concerns a jury instruction given at the second trial which the Court of Appeals found to be harmless error.

D. The Jury Instruction Held To Be Harmless Error

On November 22, 1972, during the second trial, the jury was instructed that Hanson could recover damages (1) if Shell committed overt acts in violation of the antitrust laws *after* December 23, 1964 (four years prior to the filing of the complaint), and (2) if those acts injured Hanson (Tr. II, 4314). The Court of Appeals recognized that the first half of this instruction did not comport with this Court's opinion in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), under which Hanson *would* have been permitted to recover damages accruing to him after December 23, 1964, *if those damages were not ascertainable before that date* and if they were caused by illegal conduct occurring entirely before that date. *See* 401 U.S. at 339-40. The Court of Appeals termed the trial court's instruction "a misstatement of the *Zenith* rule", but held the error to be harmless (A-16).[8] The record is conclusive that Hanson's alleged damages were clearly provable—by his own testimony—at least as early as 1961. Therefore, nothing could be gained by ordering a third trial because the

[8] *See* Fed. R. Civ. P. 61 reproduced in Appendix D.

record could only reestablish that damages were clearly ascertainable by Petitioner prior to December 23, 1964.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW WAS CORRECT AND PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW OR CONFLICT WITH OTHER DECISIONS

Hanson's request that this Court review the appeals court's decision rests entirely on his erroneous contention that by finding that one questionable jury instruction was harmless error, the Ninth Circuit thereby "overruled" *Zenith* (Pet. 7), "undermined" the authority of that decision (Pet. 19), and created a conflict between its decision and those of other courts of appeals (Pet. 23-24). Nothing could be further from the truth.

Petitioner's brief contradicts itself by first claiming that the Court of Appeals "overruled" *Zenith* (Pet. 7) and then, three lines later, conceding that the appeals court made "a correct statement of the *Zenith* rule" (Pet. 7). Obviously, Petitioner does not claim that the Court of Appeals committed a *legal* error. He merely takes issue with the *result* produced by the application of the correct law to the facts of this case.

This Court has held that trial court errors which do not affect the substantial rights of the parties are not sufficient to set aside a jury verdict on appeal.[9] In cases such as this, where it is apparent that the erroneous jury instruction could not have changed the result[10] or where the appeals court finds that a directed verdict should have been entered,[11] the erroneous instruction will be ignored.

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[9] *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943).

[10] *Harris* v. *Quinones*, 507 F.2d 533 (10th Cir. 1974); *Lynch* v. *Travelers Indem. Co.*, 452 F.2d 1065 (8th Cir. 1972); *Hampson* v. *Bucyrus-Erie Co.*, 464 F.2d 562 (3d Cir. 1972).

[11] *L&S Enterprises Co.* v. *Great Am. Ins. Co.*, 454 F.2d 457 (7th Cir. 1971); *Vecchio* v. *Anheuser-Busch, Inc.*, 328 F.2d 714 (2d Cir.), *cert. denied*, 379 U.S. 831 (1964).

A. Petitioner Seeks Only to Reopen A Purely Factual Inquiry

The only questions presented in the Petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, Petitioner asks this Court to make a third review of two lengthy trial records and to search for that which a jury, a District Judge and a unanimous Court of Appeals have been unable to find—proof that Respondent's conduct was the proximate cause of Petitioner's business failure. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below are entitled to great weight. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

This case involves nothing more than the proper use of the time-honored practice of a federal appeals court concluding that an improper jury instruction constituted harmless error, based on its review of the record evidence.[12]

B. The Ninth Circuit Properly Held That Even Had The District Court Correctly Instructed The Jury, Petitioner Could Not Have Succeeded.

Not only do the decisions below fail to present this Court with legal questions of general significance, the sole question raised was correctly resolved below and should not be disturbed.

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[12] Hanson misconstrues the purpose of a *certiorari* petition when he merely reargues the facts of this case. Whereas in the Court of Appeals he alleged that the trial court usurped his right to a jury trial (App. Br. 6), he now argues that the appellate court "usurped the jury's function" by rendering a verdict contrary to Petitioner's hopes. (Pet. 10, 15.) Clearly, Petitioner considers this a factual dispute as to the sufficiency of the evidence which has twice been resolved in favor of Shell.

1. *The Court of Appeals Correctly Ruled That Had Shell's Conduct Injured Hanson, Any Damages Were Clearly Ascertainable Prior to December 23, 1964.*

Under this Court's *Zenith* decision, Hanson could only have recovered damages which accrued after December 23, 1964 *if* those damages were not ascertainable before that date. The Court of Appeals ruled that "whatever damage Shell might have done to Hanson's business as a result of pre-December 23, 1964 conduct had accrued to Hanson *before* that date," and he was not prejudiced by the jury instruction which was held to be harmless error (A-17; emphasis supplied). In arriving at this conclusion, the appeals court followed a method of analysis which has been approved by several courts. Moreover, its holding is well supported by the record evidence, which showed that Hanson's business failed by his own inefficiencies and mismanagement and *not* by any conduct of Shell.

To determine whether a plaintiff's damages were unascertainable prior to the commencement of the limitations period, the courts have examined the parties' situation on the day before the period began. If, at that time, a jury could have estimated the plaintiff's damages based on competent evidence, then its damages were *not* "speculative" under *Zenith. See, e.g., Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 692 n.4 (D.D.C. 1974) (*appeal pending*); *Monona Shores, Inc.* v. *United States Steel Corp.*, 374 F. Supp. 930, 937 (D. Minn. 1973).[13] Where damages would have been capable of measurement by the plaintiff's own standard of proof prior to the limitations period, they are provable, not "speculative", under *Zenith. Southeastern Hose, Inc.* v. *Imperial-Eastman Corp.*, 1973-1 Trade Cases ¶ 74,479 at 94,129 (N.D. Ga. 1973).

[13] "When there is enough evidence to allow the issue to go to a jury the damages are no longer speculative, notwithstanding that at a later time better evidence of damage might become available." *Monona Shores, Inc., supra*, at 936, *cited with approval in Fontana Aviation, Inc.* v. *Baldinelli*, 418 F. Supp. 464, 470 (W.D. Mich. 1976).

In this case, by Hanson's own method of proof, the extent of his business losses—which resulted from Hanson's own inefficiencies and were *not* caused by any act of Shell—were clearly provable at any time between early 1961 and December 23, 1964, the date the limitations period began. Hanson relied upon expert appraisals of the physical assets of his business made at two different points in time, claiming the difference in appraised value to be his "damages" (Tr. II, 4170-71). Hanson also attempted to value his business by comparing it with an independent oil company sold approximately ten years earlier (Tr. II, 4172-73). By either method of proof, valuation of Hanson's business could have been made at any point during the relevant period (1961-1964), and certainly well before the statute of limitations period began.

Most importantly, the record evidence demonstrates that Hanson's business suffered throughout its existence and that it was "doomed" to failure as early as 1962 (Tr. I, 3122). As the Court of Appeals stated, "Hanson moved to Tucson, Arizona, in 1952, having assets of less than $7,000" (A-2; Tr. II, 2187, 2190-91). From 1952 to 1964, he acquired, on credit, seventeen service stations and a wholesale gasoline distributorship, which was unprofitable from the moment he entered that business in 1958 (Tr. II, 2728).

Hanson testified that his income tax returns would be the "best source" of information on the profitability of his business (Tr. II, 2728). These returns showed that "[t]hroughout the entire period from 1952 to 1964, Hanson's business lost money in all but three years, and in those three years he failed to make enough to equal the $8,000 that he thought was a reasonable value for his managerial services" (A-2, A-3).

Although Petitioner alleges that these "tax returns show that Hanson made a taxable profit" in three consecutive years (Pet. 14), this slight "profit" was before

the required deduction was made either for return on investment or for his managerial services.[14] If the $8,000 per year which Hanson considered reasonable compensation for his managerial services is deducted (Tr. II, 2927), his business consistently experienced a net loss in *each* of the years 1952 to 1964, inclusive, aggregating a $197,892 loss for that thirteen-year period (SX II, 62).

Hanson's stations were inherently inefficient and averaged only about 10,000 gallons per month per station in volume (PX I, 305). Since his gross margin was five cents per gallon (Tr. I, 2206), Hanson had a *gross monthly* "profit" of only $500 from which he had to pay the salaries of station personnel, utilities, taxes and all other expenses. Independents with whom he competed sold 45,000-50,000 gallons of gasoline per month (Tr. II, 3184). An "independent" competitor testified that it was not possible for a dealer with a monthly volume of 10,000 gallons to make enough money to continue to operate (Tr. I, 5454-55).

Hanson admitted using revenues from the sale of gasoline to acquire additional service stations in 1960-61, rather than to pay his gasoline bills (Tr. II, 2750-52). As a result of his debts, as early as 1960, he was frequently in substantial arrears with suppliers for payment for gasoline, the lifeblood of his business (Tr. I, 5048).

Although claiming that he lost his business in July 1966, as a result of price wars caused by the defendants beginning in 1961 (Tr. I, 3392), Hanson testified that the Tucson market had been plagued with acute price wars dating from 1958—when his business first became unprofitable (Tr. II, 2534-35). He also testified that price wars were caused by independents who gave trading stamps attempting to maintain a one-cent price differential over independents, such as Hanson, without stamps (Tr. I, 3074-75), and by self-service stations (Tr. I, 3447).

[14] The Ninth Circuit *requires* that ". . . an amount fairly attributable to the return on the capital investment and to the labor of the owner" be deducted from a gasoline retailerships' gross profits when valuing its good will. *See Simpson* v. *Union Oil Co. of California*, 411 F.2d 897, 909-10, (9th Cir.) *aff'd in relevant part*, 396 U.S. 13 (1969); *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188, 219 (9th Cir. 1958).

Hanson testified that he could have made a profit only in a non-competitive "stable market" at which all major dealers sold regular gasoline at the price of 33.9¢ a gallon, all independents who gave stamps at 32.9¢, and all independents without stamps at 31.9¢ (Tr. I, 3456). He admitted that this abnormal market could be maintained in Tucson only by a mutual understanding or an unlawful agreement in restraint of trade (Tr. I, 3478).

Hanson also admitted that he was the only independent in Tucson to fail in this period (A-15; Tr. I, 2957). The independent-brand retailer now operating three of Hanson's former service stations—a witness at the trial—is doing three times as much business in each of them as Hanson did (Tr. II, 3817-18). This operator went into business in 1963 (when Hanson was failing) with one service station and by 1972 had increased his business to 40 stations, and has made money in every year (Tr. II, 3814).

Part of Hanson's troubles stemmed from his inherently inefficient marketing structure. While the successful independents with whom he competed bought directly from a refiner and sold to the motoring public, Hanson bought from a distributor and resold to dealers who in turn sold to the motoring public (A-14; Tr. I, 3648-52). A successful "independent" marketer testified that such a business structure could not successfully compete in the Tucson market (Tr. I, 5452-53).

Hanson was constantly beset with supply problems. He had been indebted to one supplier in 1960 (Tr. I, 3165) and was forced to make a new supply arrangement with

a firm that was later purchased by Gulf.[15] (Tr. I, 2220-21, 5011-12). By November 1962, he owed approximately $85,000 to that supplier (Tr. II, 2767) and was forced to purchase gasoline on a cash-and-carry basis (Tr. II, 2775-76). In 1962, he decided to leave the business because of his supply problems. He admitted that unless he found a new supplier or sold his business he was "doomed" in 1962 (Tr. I, 3122).

At trial, Hanson's *own witness* attributed Petitioner's business failure to his supply arrangements, a lack of finances, bad business practices and personal habits which interfered with his management of the business (Tr. II, 3140-42).

After reciting these facts, the Court of Appeals concluded that "by the end of 1964, he [Hanson] owed substantial amounts to over thirty creditors, and he had exhausted his credit" (A-3). Moreover, "*Hanson's evidence* shows that in the entire fourteen-year history of his business, there was not one year in which he showed a profit, and in only three years did he make enough to cover even part of the value of his own time and services" (A-17, A-18; emphasis supplied).

While accusing the Ninth Circuit of presenting "a totally one-sided view of the evidence" (Pet. 13), Hanson deceptively contends that, in 1962, he had "an invested cost of $275,000 in 17 stations" (Pet. 13), without revealing that with debts exceeding $300,000, Hanson was insolvent six years before he brought this antitrust suit against Shell[16] (Tr. I, 3133).

[15] Respondent Shell *never* supplied gasoline to Hanson. Gulf, which did supply Hanson, received a directed verdict at the first trial, from which no appeal was taken (Tr. I, 5915, 5917).

[16] Hanson's chronic financial difficulties obviously prompted Circuit Judge Wright to conclude that he had failed to establish "the necessary 'reasonable probability' of some causal connection between the defendant's wrongful act and some injury to the plaintiff" (A-20).

Attempting to extricate himself from the "hopeless conditions" (A-3) which prevailed in 1962, Hanson hired his son-in-law to manage the daily business affairs so that he could devote full time to selling his business (Tr. I, 3120-22). He offered his business to at least 13 different oil companies, but "not surprisingly, he was unable to find any interested buyers" (A-3; Tr. I, 3152).

By August 1964, Hanson had stopped taking price surveys in recognition of the fact that his business had come to an end (Tr. I, 3036). Finally, in July of 1966, Hanson closed his business (A-3).

Petitioner's suggestion that his losses were unascertainable until July of 1966 is contrary to these record facts which the Court of Appeals reviewed in its extensive opinion. Hanson proposed that his damages be measured by comparing his business to one sold ten years earlier or by means of appraisals of his physical assets made at varying points in time. By these criteria, Hanson's damages were clearly provable at any time after May of 1961, allegedly the date on which Shell's purportedly harmful conduct began. A jury could have made a reasonable estimate of Hanson's damages well before December 1964. Thus, under numerous cases interpreting *Zenith*, Hanson's damages were *not* "speculative" prior to the commencement of the limitations period on December 23, 1964.[17]

Hanson's own testimony fully supports the Court of Appeals' statement that "[t]he only reasonable conclusion that can be drawn is that the value of Hanson's business in December of 1964 was no greater than its value in 1966 when he closed up shop" (A-17). Since Hanson's damages were ascertainable prior to December 23, 1964, the *Zenith* rule was not applicable in this case. Therefore, the trial court's jury instruction qualified as harmless error, as the Court of Appeals found.

[17] *See* cases discussed at page 8, *supra*.

2. ***The Court of Appeals Correctly Ruled That Shell Was Not Liable for Acts Occurring Before December 23, 1964.***

Shell could not be held liable for acts committed prior to December 23, 1964. On July 27, 1970, summary judgment was entered in favor of Shell "as to all alleged violations of the antitrust laws occurring prior to December 23, 1964" (R. 81, 88), and Petitioner *never* assigned this ruling as error on appeal.

Moreover, substantial evidence supported the jury's finding in favor of Shell.[18] At the close of Hanson's case at the second trial, Judge Walsh candidly remarked:

> I have to say at this point that I have a very serious doubt that the evidence in the Plaintiff's case is sufficient to permit the jury to reasonably conclude . . . that Shell and Standard conspired either to fix prices in the Tucson area or to monopolize the sale of motor gasoline in the Tucson urban area (Tr. II, 3439).

The most significant fact refuting the claimed conspiracy is that Hanson charged Shell and Standard with a conspiracy to *reduce* prices (Tr. I, 2616-19), but the evidence showed that Shell was a low price marketer and Standard a high price marketer (Tr. I, 513-14). It is axiomatic that a conspiracy may sometimes be necessary to *raise* prices, but anyone with the funds to finance the venture can lower prices without need of a co-conspirator.[19] Hanson admitted that one service station could bring down the prices in the whole city of Tucson by lowering its prices (Tr. II, 2631-33).

For these reasons, it is evident that the Court of Appeals properly ruled that the jury instruction which

[18] *See* note 7 *supra* at 4.

[19] *See, e.g., U.S.* v. *New York Great Atlantic and Pacific Tea Co., Inc.*, 67 F. Supp. 626, 668 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

"misstated the *Zenith* rule" was harmless error. An abundance of evidence supports the appeals court's holding that no horizontal conspiracy existed between Shell and Standard before or after December 23, 1964. Therefore, even if the trial court had correctly instructed the jury, it could not have found any pre-December 23, 1964 acts by which the Respondent could have violated the antitrust laws.

C. There Is No Conflict In The Circuits Because This Case Is *Sui Generis* And Is Factually Distinguishable From Each Of The Cases Cited By Petitioner.

Contrary to Petitioner's assertion (Pet. 23-24), the unanimous decision of the Court of Appeals is not in conflict with *Continental-Wirt Electronics Corp.* v. *Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir. 1972), or *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 456 F.2d 662 (5th Cir. 1972), *cert. denied*, 428 U.S. 1054 (1976). There was no evidence in either of those cases that the plaintiff's damages were ascertainable prior to the commencement of the limitations period. Consequently, in *Continental-Wirt, supra*, the court remanded for a determination as to whether damages were "speculative" at the moment that the last overt act in the antitrust conspiracy occurred. 459 F.2d at 770. The court expressly reserved judgment as to whether the *Zenith* rule would apply, and held that such a determination "cannot be made without further development of the facts" (*id.*). Since the factual record in *Hanson* was developed in detail at two lengthy trials, a remand for further factual development is unnecessary in this case, particularly where a jury has found insufficient evidence to link any of Shell's acts to Petitioner's business demise.

Furthermore, in *Poster Exchange, Inc., supra*, the court emphasized that the plaintiff, on remand, would be required to show "the earliest reasonable time or times for which damages . . . could have been proved to fix the commencement of the limitations period under

Zenith" 456 F.2d at 668. This decision supports Judge Duniway's conclusion that "whatever damage Shell might have done to Hanson's business as a result of pre-December 23, 1964 conduct had accrued to Hanson before that date and he may not recover those damages under the *Zenith* rule" (A-17). Since "the earliest reasonable time" at which to calculate Hanson's damages occurred prior to December 1964, the *Zenith* rule would not be applicable in this case, as the Ninth Circuit so held.

Likewise, this case is factually distinguishable from *Ansul Co.* v. *Uniroyal, Inc.*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972). Since the district court had found that the defendant's unlawful conduct had continued throughout the limitations period and one year after suit was filed, the appeals court appropriately ruled that the plaintiff could not have proven the full extent of its damages five years earlier. In *Hanson*, the jury was presented with all of Petitioner's evidence as to both pre- and post-1964 conduct by Shell (A-17). The court failed "to find any illegal conduct after" December 23, 1964 (*id.*) and judgment was entered in favor of Shell. Petitioner does not even contend that Shell was committing illegal acts at the time of trial, and in fact contends that a jury could have "reasonably found" that *all* of Shell's purportedly illegal acts occurred *prior* to the commencement of the limitations period (Pet. 12). Hence, *Ansul Co.* is distinguishable on its facts from the instant case.

D. The Rule of Law Urged by Petitioner Would Create Confusion in the Law Where None Presently Exists and Would Undermine Effective Enforcement of the Antitrust Laws.

Although Petitioner admitted at trial that his business was "doomed" as early as 1962 (Tr. I, 3122), he now contends that his damages could not have been ascertained until he closed his business in July of 1966. Under Petitioner's theory, no plaintiff in an antitrust case could recover damages resulting from unlawful acts until he was actually put out of business. The Court of Appeals rejected this theory as unsound:

> What this argument implies is that efficient and hard-working independent dealers who make a profit despite illegal conspiracies directed against them have no remedy, but incompetents who are forced out of business can recover, trebled, all losses ever suffered. (A-18 n.9).

Petitioner's suggested rule of law has been rejected by numerous courts. In *Akron Presform Mold Co.* v. *McNeil Corp.*, No. C-68-489 (E.D. Ohio 1973), *aff'd*, 496 F.2d 830 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974), plaintiff sought to invoke the *Zenith* rule by alleging that his damages were unascertainable until he ceased doing business. The district court rejected that argument, saying "the fact that Presform went out of business in 1965 is not dispositive . . ." (Slip Op. at 7). *See also Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 692 n.4 (D.D.C. 1974) (*appeal pending*) ["Damages are not so speculative that a cause of action does not accrue under *Zenith* simply because they are not yet liquidated."]

In *Monona Shores, Inc.* v. *United States Steel Corp.*, 374 F. Supp. 930 (D. Minn. 1973), the court set forth a method for determining whether damages are speculative under *Zenith* which has been followed by other courts,[20] and which rejects Petitioner's contention that his damages were speculative until he actually ceased doing business. To determine whether damages are speculative prior to the limitations period:

> This court must look to the day before the statute of limitation period . . . four years and one day prior to the commencement of this action. If antitrust damages were speculative on that date, then the statute of limitations does not bar this action.

[20] *See Fontana Aviation, Inc.* v. *Baldinelli*, 418 F. Supp. 464 (W.D. Mich. 1976).

> If they (1) had been suffered and (2) were provable on that date, then the plaintiff's claim is barred (374 F. Supp. at 935).[21]

Two courts below have held that Shell did not cause Hanson injury as a result of antitrust violations; thus, the first of the two elements stated above could not be satisfied by the Petitioner. Moreover, as early as 1962, Hanson admitted his business was "doomed" (Tr. I, 3122) and his business had such a dismal future that substantial efforts to sell it proved futile. Viewing Hanson's business on December 22, 1964—as *Monona Shores* and other courts have suggested[22]—it is clear that whatever damage Hanson sustained was readily capable of proof by Hanson's own standards of measurement.

If Hanson's suggested rule of law—that damages are not "ascertainable" until one is actually out of business—were adopted, confusion would be created among the courts in seeking to determine whether damages are "ascertainable" under *Zenith.* No such confusion presently exists and there is no conflict on this issue among the circuits.

Moreover, the *Zenith* rule is necessary to insure "that strong enforcement of the antitrust laws through private actions" continues. *Monona Shores, supra,* at 935. In fact, "any other rule would allow some damages to go unremedied" (*id.*) Under Petitioner's theory, a private plaintiff's antitrust claim would go unremedied until that party was forced entirely out of business. Such a rule would be contrary to the policy enunciated in *Zenith,* which favors vigorous enforcement of the antitrust laws by private parties injured as a proximate result of illegal acts. *See* 401 U.S. 321 at 340.

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[21] Judge Neville rejected plaintiff's contention that his damages were unascertainable until his property was "completely lost." 374 F. Supp. at 935.

[22] *Accord, Poster Exchange, Inc., supra* at 668; *Railing* v. *United Mine Workers of America,* 445 F.2d 353, 354-55 (4th Cir. 1971).

CONCLUSION

The practice of this Court has been to grant writs of certiorari only in cases involving either principles of fundamental importance to the general public or a direct conflict of circuit court opinions. Respondent respectfully submits that the instant Petition presents no important question of federal law and no conflict of decisions calling for resolution by this Court. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 3, 1977

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1034

C. O. HANSON,
Plaintiff-Appellant,
vs.
SHELL OIL COMPANY,
Defendant-Appellee.

[September 3, 1976]

Appeal from the United States District Court for the District of Arizona

OPINION

Before: DUNIWAY and WRIGHT, Circuit Judges, and LUCAS,* District Judge

DUNIWAY, Circuit Judge:

In this action appellant Hanson charged appellee Shell Oil Company and defendants Standard Oil Company of California and Gulf Oil Company with violations of § 7 of the Clayton Act, a vertical restraint of trade and horizontal restraint of trade, both under § 1 of the Sherman Act, and attempt and conspiracy to monopolize un-

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* The Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.

der § 2 of the Sherman Act. The trial court granted summary judgment to all defendants based on all acts occurring before December 23, 1964, and to Gulf on the § 7 Clayton Act charge. At trial, directed verdicts were entered for all defendants on all remaining claims except for the horizontal restraint charge under § 1 and the conspiracy charges under § 2 of the Sherman Act against Shell and Standard. The jury returned a verdict on those two charges for Hanson and awarded damages of $363,181.31, which when trebled would exceed $1 million. Defendants Shell and Standard moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The court denied the motions for judgment n.o.v., but granted a new trial on the two issues that had been submitted to the first jury. At the new trial, against Shell alone, the second jury found for the defendants. Hanson now appeals, asserting error in (1) the granting of the motion for a new trial, and (2) granting the directed verdict for Shell on the § 1 vertical restraint claim and the § 2 attempt to monopolize claim. He also attacks the court's instruction to the second jury concerning acts occurring before December 23, 1964, and the rejection of certain evidence. Shell is the only appellee, Hanson's claims against Standard having been settled. We affirm.

I. *Statement of the Facts*

Hanson moved to Tucson, Arizona, in 1952, having assets of less than $7,000. He invested this money in his first service station under the name of "Hanson's Direct Service." Over the following ten years he expanded his business to include seventeen service stations along with a distributorship for El Paso Natural Gas products which he acquired in 1958. Throughout the entire period from 1952 to 1964, Hanson's business lost money in all but three years, and in those three years he failed to

make enough to equal the $8,000 that he thought was a reasonable value for his managerial services. Thus, Hanson's expansion was financed entirely through credit, much of which was unwilling. Hanson admitted at the first trial that he used money from gasoline sales to acquire new stations rather than to pay his gasoline bills to his suppliers. Thus, by 1964, Hanson had turned his just under $7,000 into seventeen old service stations, one natural gas distributorship, and hundreds of thousands of dollars of debt.

Hanson's business was continually short of cash. By the end of 1964, he owed substantial amounts to over thirty creditors, and he had exhausted his credit. Hanson could buy gasoline only on a cash and carry basis. This, the relatively shoddy condition of his stations, and his difficulty in keeping station managers, combined to keep Hanson's monthly gasoline sales average around 10,000 gallons per station, while other independent dealers in Tucson were averaging four to five times that amount. Testimony at the first trial indicated that with such a low sales volume a dealer could not continue to operate indefinitely.

Because of these hopeless conditions, beginning in 1962, Hanson attempted to sell his entire business, but, not surprisingly, he was unable to find any interested buyers. In July of 1966, Hanson finally closed out his business. Like many another loser in the competitive endeavor, he decided to try the antitrust laws as a means of shifting his losses to someone else. He brought the present action against Shell, Standard, and Gulf on December 23, 1968, two and one-half years later.

Hanson claims that he was the victim of an endless series of retail gasoline price wars which plagued the Tucson market from 1958 to well after Hanson shut down his business in 1966. He claims that the cause of

these price wars was the policy of Shell and Standard Oil, by price gouging, to run private brand and independent dealers out of the market. He points specifically to a change in Shell's pricing policy adopted in 1961 whereby Shell began a program of more vigorous price competition designed to regain the market share in the Western Region which Shell had lost in the previous six years. Hanson claims that in furtherance of this plan to seize market strength from the small private brand and independent dealers, Shell threatened and coerced its retail dealers to conform to Shell's suggested predatory prices, and also enlisted Standard's cooperation so that their efforts could be directed solely at the independents rather than at each other. The complaint alleged that because of the vertical restraints placed on the Shell dealers and the horizontal arrangement with Standard, Shell violated §§ 1 and 2 of the Sherman Act and thereby caused Hanson to lose his business.

II. *The Directed Verdict on the § 1 Vertical Restraint Claim was Proper.*

Hanson claims that Shell violated § 1 of the Sherman Act by fixing the retail price of gasoline sold by franchised Shell dealers. This vertical price fixing was supposedly accomplished through the use of company-owned stations which could put competitive pressure on franchised dealers, through the use or non-use of "dealer assistance," and through threats of refusals to deal such as not renewing dealer leases. After hearing all of the evidence, the trial court directed a verdict for Shell on this claim.

In the absence of fair-trade statutes, vertical resale price maintenance agreements are *per se* violations of § 1. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 1911, 220 U.S. 373, 399-400. This is true even though the agreement be only an implied one. *F.T.C.* v. *Beech-*

Nut Packing Co., 1922, 257 U.S. 441, 453. If the agreement between the supplier and his buyer is reached because of coercive conduct toward noncomplying buyers, such as refusals to deal, a violation is also made out. *Simpson* v. *Union Oil Co.*, 1964, 377 U.S. 13, 17. The refusal to deal which gave rise to the vertical agreement in *Simpson* was Union Oil's failure to renew a dealer's lease because of his lack of compliance with the company's suggested resale prices. Thus, if the evidence presented at the first trial, taken in the light most favorable to Hanson, could support a finding that there was a coerced agreement between Shell and its retail dealers, the directed verdict must be reversed. *Cornwell Quality Tools* v. *C.T.S. Co.*, 9 Cir., 1971, 446 F.2d 825, 830.

Hanson points to three different items of evidence which he claims to be sufficient to require that the § 1 vertical restraint claim be submitted to the jury. First, there was evidence that during the early 1960's Shell maintained one or two company-owned stations in Tucson which would set the retail price at the point the company recommended and thus put pressure on the other Shell dealers to comply. There are a number of reasons why this does not support Hanson's case. Hanson claims that Shell's war against the independents was waged in the Western Region encompassing five states, so that the fact that two company stations were maintained in Tucson, Arizona, is hardly evidence of coercion of Shell dealers throughout the relevant market. Moreover, even if the relevant market were limited to Tucson, two company-owned stations out of the multitude of Shell brand stations that existed in Tucson's eight trade areas would not be evidence of pressure being put on the franchise dealers. Hanson's own witness, a Mr. Wolken, the largest Shell brand franchisee in Tucson, testified that to his knowledge there were no company-owned Shell stations in Tucson. Finally, even if such pressure did flow from

maintaining company-owned stations, there is no legal or economic reason for finding the use of such market pressures to be violative of § 1.

Hanson next points to Shell's use of "dealer assistance," a pricing system whereby Shell lowered its "tank wagon price" (wholesale dealer price) to dealers whenever it recommended that the dealers reduce their retail prices.[1] Hanson contends that by reducing the tank wagon price whenever it recommended a lower retail price, Shell put pressure on the individual dealer to follow the recommendation, because every other Shell station would be priced below him if he did not. This argument has no merit. The uncontroverted evidence shows that dealer assistance was provided by Shell in a given area to individual dealers who asked for it. Dealers asked when they felt forced to lower their retail prices in order to meet local competition but felt financially unable to absorb the entire price reduction out of their margin. Thus, they asked Shell to give them dealer assistance so that they could meet competition without extreme financial sacrifice. The program was not initiated by Shell to force dealers to fix prices, but was initiated by dealers to enable them to stay competitive.

If Shell conditioned "dealer assistance" on a dealer's actually reducing his retail price, a more serious look at possible § 1 violations would be warranted. *See Lehrman* v. *Gulf Oil Corp.*, 5 Cir., 1972, 464 F.2d 26. However, the testimony of Hanson's witness, Mr. Wolken, was that the changes in tank wagon price made by Shell were made for every dealer on request, whether or not

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[1] For each of the first four cents in recommended retail price reduction, Shell lowered the tank wagon price to its dealers by three-fourths of a cent. Thus, after a four-cent recommended reduction, Shell absorbed three cents. After the first four cents, Shell reduced the tank wagon price on a penny for penny basis absorbing 100% of all recommended price reductions.

the requesting dealer suggested changes in retail price, and the testimony of another Shell dealer in Tucson, Mr. Mergard, also a witness for Hanson, verified that Shell's policy was that any "dealer assistance" was not predicated on the dealer's retail price. Thus, the "dealer assistance" program could not be construed as an attempt by Shell to regulate its dealers' retail prices.

Finally, Hanson points to the testimony of his witnesses, Messrs. Wolken and Mergard, claiming that it shows that coercive tactics were used by Shell representatives to gain dealer compliance. In fact, the testimony of these two dealers supports Shell, not Hanson. The only part of Wolken's testimony which even arguably supports a claim of coercion involves a bit of fancy questioning by Hanson's attorney. After questioning Wolken on how price conversations with his Shell representative would generally go, Hanson's attorney asked him if Shell had ever threatened to cancel his lease. Wolken responded that in 1962 his Shell representative had threatened to cancel his lease "if I didn't do as I was told." Interestingly, the specific dispute from which the threat arose was never revealed and Hanson's attorney never asked that question. It is only speculation that the threat arose over a price controversy. If Hanson is to claim that this threat was an attempt to regulate retail prices, the connection between the threat and a price dispute must be shown. In addition, even though at the heart of his claim, Hanson was unable to get any other examples of suggestively coercive conduct from the largest Shell dealer in Tucson who testified to deviating from the suggested price ten percent of the time. The most that can be drawn from Wolken's testimony to support Hanson is that on a single occasion a local company representative warned a single dealer that his lease might be cancelled over a dispute about an unknown topic. This gives Hanson's claim no support.

Mergard's testimony is no more helpful. He testified that on a single occasion his Shell representative told him that they could enter a "period of better cooperation" if he would get Shell products on the shelves, put price signs up, and follow recommended prices. There was no testimony as to what constituted "bad cooperation" on Shell's part, whether Mergard felt pressured into following the recommended retail price, or whether this was an isolated incident. On cross-examination, however, Mergard said that despite his ignoring the recommended retail price for over a year before his lease renewal date Shell renewed his lease, and that for two years he did not regularly follow the price recommendations. Hanson's reliance on Mergard's testimony that he felt that his "dealer assistance" was often delayed is misplaced as well.[2] Mergard testified that the reason for the delay was Shell's business judgment that the particular trade area did not qualify for such assistance and not an attempt to pressure dealers into price compliance.

Both witnesses testified that they were free to post their own prices based on their own business judgment, and that they did in fact always follow that judgment.[3] The directed verdict was proper.[4]

[2] It is curious that Hanson should introduce evidence suggesting Shell often withheld dealer assistance while accusing Shell of using it as a means of predatory price gouging.

[3] Even had Hanson presented sufficient evidence upon which a jury could have found that Shell attempted to coerce dealers into following the recommended price, his failure to show that any dealers in fact succumbed to this pressure is an additional basis for a directed verdict since without such a showing no connection between Shell's conduct and Hanson's retail business difficulties could be found.

[4] *Gray* v. *Shell Oil Co.*, 9 Cir., 1972, 469 F.2d 742, makes it clear that a supplier may suggest retail prices to its dealers and use "persuasion" to get them to adopt the suggested prices. No violation is made out unless plaintiff can show that the supplier's conduct rose to the level of coercion sufficient to deprive the dealers of their free choice. Hanson made no such showing.

III. *The Directed Verdict on the § 2 Attempt to Monopolize Claim was Proper.*

Hanson's claim is that Shell's pricing policy was an illegal attempt to monopolize prohibited by § 2 of the Sherman Act. In his brief, however, Hanson fails to point to any evidence in the record, and fails to provide any legal analysis, to support his claim other than to argue that the grounds upon which the trial judge based his directed verdict were improper. Even more extraordinary, however, is Hanson's failure to reveal what part of interstate commerce he believes that Shell was attempting to monopolize. Was it the wholesale or the retail gasoline market? If the wholesale market is the focus of his charge, then a directed verdict was proper because no relationship between Hanson's business failure in the retail market and Shell's alleged attempt to monopolize the wholesale market was shown. If the attempt was to monopolize the retail market, Hanson's case hinges on his ability to show that Shell attempted to control retail prices, a fact which, as we have already noted, Hanson was unable to prove.

Beyond these threshold failures, Hanson also failed to demonstrate anything which could support a finding that one of the essential elements of an illegal § 2 attempt was present. An "attempt to monopolize" requires that acts be performed with the specific intent to monopolize. *See, e.g., American Tobacco Co.* v. *United States*, 1946, 328 U.S. 781, 809; *Swift & Co.* v. *United States*, 1905, 196 U.S. 375, 396; *Cornwell Quality Tools Co.* v. *C.T.S. Co., supra*, 446 F.2d at 832.

Hanson presented no evidence which would suggest that the "specific intent" to monopolize existed; he does not even discuss specific intent in his brief. It is true that Shell adopted a new pricing policy in 1961 designed to expand its share of the Western Region market, but

this reflects no more than Shell's unwillingness to watch its market share continue to erode as it had done since 1955. Before the new pricing policy could get Hanson to the jury as a possible attempt to monopolize, Hanson had to establish that the new policy represented "predatory pricing" designed to drive competitors out of the market and establish monopoly benefits for Shell. This he has made no attempt to do.

To demonstrate predation, Hanson had to show that the prices charged by Shell were such that Shell was foregoing present profits in order to create a market position in which it could charge enough to obtain supranormal profits and recoup its present losses. This could be shown by evidence that Shell was selling its gasoline at below marginal cost or, because marginal cost is often impossible to ascertain, below average variable cost.[5] *See International Air Industries, Inc.* v. *American Excelsior Co.*, 5 Cir., 1975, 517 F.2d 714, 723-24; Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 1975, 88 Harv. L. Rev. 697, 703-18. Hanson made no effort to prove that the prices Shell was charging at either the wholesale or the retail level were below marginal or average variable costs, and for all that appears Shell's new pricing policies were nothing more than an attempt to gain a larger share of the market because of its stronger competitive position.

[5] An alternative possibility might be a showing that the defendant charged a price which, although above marginal or average variable cost, was below its short run profit-maximizing price and that barriers to entry were great enough to prevent other entry before the predator could reap the benefits of his oligopolistic or monopolistic market position. *See International Air Industries, Inc.* v. *American Excelsior Co.*, 5 Cir., 1975, 517 F.2d 714, 724. There is some question, however, whether pricing below a profit maximizing point which is still above marginal and average variable costs should be considered predatory; it only discourages inefficient new entrants who must have higher prices to survive. *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 704-09.

If its prices were above its costs, and nevertheless Shell's policies did drive Hanson out of business, this can only be because Hanson was so inefficient that at prices at which Shell could make a reasonable profit he could not. The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency. Hanson's failure to show that Shell's prices were below its marginal or average variable costs was a failure as a matter of law to present a prima facie case under § 2.[6]

IV. *The Granting of a New Trial on the § 1 Horizontal Restraint and § 2 Conspiracy Claims was Proper.*

Hanson also charged that Shell and Standard entered into an agreement to avoid competition between themselves and to drive the independent dealers out of business, and that this conduct was a violation of §§ 1 and 2 of the Sherman Act. Although at the first trial the jury returned a verdict for Hanson on these claims in the amount of $363,181.31, the trial court concluded that the verdict was against the weight of the evidence, that the damages were excessive, and that his instructions on the damages issue were improper. On these grounds, the court ordered a new trial on both issues. Hanson now argues that this order was error.

The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if "the

[6] While proof of pricing below marginal or average variable cost is prerequisite to a prima facie showing of an attempt to monopolize, such a showing, if made, would not show a *per se* violation. There may be non-predatory and acceptable business reasons for a firm engaging in such pricing. Plaintiff's showing of below-cost pricing merely clears the first hurdle and raises the question of justification.

verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice." *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 9 Cir., 1957, 249 F.2d 246, 256. A new trial may also be granted when in his judgment the trial judge finds that the "amount of compensation awarded is excessive." *Murphy* v. *United States District Court*, 9 Cir., 1944, 145 F.2d 1018, 1020. Absent a showing that the trial court abused its discretion, the order granting a new trial will not be reversed on appeal. *Oswald* v. *Cruz*, 9 Cir., 1961, 289 F.2d 488. Furthermore, reversal is unwarranted unless the trial court abused its discretion with respect to each ground upon which it based the order; if any ground is reasonable, the order must be affirmed. *Nuttall* v. *Reading Co.*, 3 Cir., 1956, 235 F.2d 546, 548. Our review of the record convinces us that the trial court did not abuse its discretion in ordering a new trial on any of the stated grounds.

A. *The Verdict was Against the Weight of the Evidence.*

Hanson's argument hinges on some documented meetings between Standard and Shell executives at an oil trade association meeting and at other times in San Francisco where their offices are located. When an illegal conspiracy or agreement to restrain trade is charged, there must be evidence from which actual agreement or mutual consent can be found or inferred. *Esco Corp.* v. *United States*, 9 Cir., 1965, 340 F.2d 1000, 1007-08. Thus, evidence of meetings alone is not sufficient; there must also be evidence sufficient to permit the jury to infer illegal agreement. We agree with the trial judge that the evidence that Hanson offered to show such agreement was so lacking that the verdict against Shell was against the weight of the evidence.

Hanson attempted to show agreement by introducing evidence of parallel pricing behavior on the part of the two oil companies and the willingness of the companies to share price information. His evidence was weak. This court has noted that:

> Similarity of prices in the sale of standardized products . . . will not alone make out a prima facie case of collusive price fixing in violation of the Sherman Act, the reason being that competition will ordinarily cause one producer to charge about the same price that is charged by any other. *Independent Iron Works, Inc.* v. *U.S. Steel Corp.*, 9 Cir., 1963, 322 F.2d 656, 665.

In fact, the massive volume of evidence comparing prices of various dealers and companies in the Western Region and in Tucson showed that Shell's retail prices were paralleled by the prices of the other majors and of independent dealers as frequently as, if not more frequently than, they were by Standard. While wholesale price data were much less complete, there was nothing offered by Hanson to show that Standard and Shell moved with any more consistency with one another than with any other supplier.

Likewise, Hanson's claim that the willingness of the two companies to share wholesale price information demonstrated an agreement is also weak. Unlike *United States* v. *Container Corp. of America*, 1969, 393 U.S. 333, this case does not involve companies exchanging secret price information for the purpose of price stabilization. Here, Shell and Standard were willing to seek and to reveal wholesale price information for the purpose of reducing their prices to retail dealers requesting "dealer assistance" when such aid was appropriate. The information was not secret and was available to anyone requesting it. The goal of either company was not

shown to be price stabilization, but rather price reductions in order to help local dealers faced with severe competition. Such exchange of information does not rise to the level of an illegal conspiracy, *see Gray* v. *Shell Oil Co.*, 9 Cir., 1972, 469 F.2d 742, 746-47, and the trial court did not abuse its discretion in finding that this, coupled with the other scant evidence of illegal agreement, was outweighed by the massive amounts of evidence introduced to show that Shell and Standard were active competitors, not conspirators.

B. *The Damage Award was Excessive.*

The trial court also found that because the evidence was weak in showing that Shell's pricing policy was a proximate cause of Hanson's financial difficulties, and because the evidence as to Hanson's actual damages was misleading and confusing, a new trial was necessary. Again, we cannot say that this was an abuse of discretion.

Hanson argues that Shell's predatory pricing was the proximate cause of his going out of business, and that Shell should be liable for the full value of the business. Hanson did not, however, produce evidence tying Shell's conduct, or even the price wars that dominated the Tucson market,[7] to his business failure. In fact, the evidence, considered as a whole, points to the opposite conclusion.

Long before Shell's new pricing policy, Hanson was pumping quantities of gasoline far below those necessary to survive. His stations were old and dilapidated. He imposed two middlemen between the supplier and dealer, thus having trouble keeping his dealers because

[7] Apparently Hanson ties Shell's alleged pricing policy to his problems by claiming that it was this illegal activity which caused the price wars. The testimony, however, is that it was the independents who started the wars.

the margin that he could offer was too small. He had inadequate supplies of gasoline in a town flooded with it because he had gotten over his head in debts and lost all of his credit. In short, almost every piece of evidence points to the conclusion that Hanson went broke because of his incompetent and inefficient management. Of all the independent dealers in Tucson during the period in issue, only Hanson was forced out of business, and one such dealer subsequently took over three of Hanson's stations and operated them at a substantial profit despite Shell's alleged war of genocide on the independents. Apparently, only Hanson was affected by the war. The market share of the other independents in Tucson rose from 19.5% in 1962 to 30.4% in 1967, while Shell's market share fell from 10.2% to 9% over the same period. Thus, the jury's finding that Shell's policies were the proximate cause of Hanson's troubles was clearly against the weight of the evidence.[8]

In addition, the evidence presented as to the value of Hanson's business was confusing at best and incredible at worst. Hanson admitted that the profit and loss statement for December 1, 1961, to November 30, 1962, upon which he relied heavily, did not reflect the complete profit picture of the business as required in *Wolf* v. *National Lead Co.*, 9 Cir., 1955, 225 F.2d 427, 430-31. Likewise, Hanson's testimony that his business was worth $1.00 for every gallon of gasoline sold per month, even if admissible, was mere assertion, and in light of his long term profit picture was, to say the least, unreasonable. The trial court was well within its discretion in granting a new trial based on its belief that the jury was confused by the damage evidence and returned an excessive verdict.

[8] In fact, Hanson's showing was so insubstantial that the trial court's only possible error was its failure to direct a verdict for Shell on all counts at the close of the evidence.

V. *The Statute of Limitations Issue.*

At the second trial on the claimed Shell-Standard conspiracy, the trial judge instructed the jury:

> You have heard throughout the trial the references to the date December 23, 1964. That date is important to this lawsuit because Plaintiff may recover damages only if you find *that the Defendant committed overt acts in violation of the antitrust laws after December 23, 1964*, and if those acts injured the Plaintiff. I have permitted you to hear evidence as to other matters before December 23, 1964, but such evidence was admitted only as background material which the Plaintiff was permitted to produce for the purpose of attempting to show the origins of alleged conduct which Plaintiff charges occurred after December 23, 1964. (emphasis added)

Hanson claims that this instruction was in error because of the Supreme Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 1971, 401 U.S. 321, 339-40. We agree that the instruction was a misstatement of the *Zenith* rule, but the error was harmless.

Zenith stands for the proposition that a plaintiff may recover for acts violative of the antitrust laws committed prior to the statute of limitations date, but that he may only recover those damages for such acts which accrued and became ascertainable within the period of the statute. *See* 401 U.S. at 338-42. Thus, the trial court's instruction that the jury had to find an overt illegal act within the period of the statute was in error; Hanson could have recovered damages accruing to him after December 23, 1964, if those damages were not ascertainable before that date and were caused by illegal conduct occurring entirely before that date. Nevertheless, the error was harmless.

First, the trial court did admit all evidence of Shell's pre-December 23, 1964, conduct which Hanson thought was relevant to his case. Hanson alleged, and the evidence showed, that Shell's conduct, and its relationship with Standard, were constant throughout the early 1960's, and until Hanson's business demise in 1966. If Shell were committing illegal acts before the cut-off date, there is no question that it also committed those same acts after that date. The jury heard all of the evidence of both pre- and post-December 23, 1964, conduct, and by failing to find any illegal conduct after that date, it must have also found that there was no illegal conduct before that date. Thus, the instruction was harmless error.

Second, even under the *Zenith* rule, Hanson would have been limited to recovering damages which he suffered after December 23, 1964. The evidence concerning the history of Hanson's business fortunes shows that as early as 1962, Hanson was trying to get out of the business but was unable to find anyone willing to buy him out at any price. His losses were substantial throughout the following years. The only reasonable conclusion that can be drawn is that the value of Hanson's business in December of 1964 was no greater than its value in 1966 when he closed up shop. Thus, whatever damage Shell might have done to Hanson's business as a result of pre-December 23, 1964, conduct had accrued to Hanson before that date, and he may not recover those damages under the *Zenith* rule.

It cannot be said that in the year and a half between December 23, 1964, and the time when Hanson closed his business Shell's earlier conduct cost him lost profits which was damage not accruing until after the crucial date. Hanson's evidence shows that in the entire fourteen-year history of his business, there was not one year in which he showed a profit, and in only three years

did he make enough to cover even part of the value of his own time and services. The evidence does not support the notion that Shell's conspiracy with Standard, which Hanson alleges began in 1961, caused him to lose profits in the last year and a half of a business which never made a profit in its entire history dating back to 1952 Hanson's losses were no greater after the alleged conspiracy began than before.[9]

VI. *The Court did not Err in Excluding the Lundberg Surveys.*

The court excluded from evidence the Lundberg Surveys, periodic price listings of the retail prices of gasoline in a given area at a given time. Hanson argues that the survey was admissible under the exception to the hearsay rule permitting market reports and price listings relied on in the industry to be admitted under the assumption that they are reliable. *See Commonwealth of Virginia* v. *State of West Virginia,* 1951, 238 U.S. 202, 212. However, the trial judge had sound grounds upon which to exclude the surveys from evidence.

The trial court may reject unreliable price information. *Herzog* v. *United States,* 9 Cir., 1955, 226 F.2d 561, 564. In this case there is ample evidence upon which the trial court could base a finding of unreliability. While there is a showing that the survey was relied upon in the industry, the evidence is that it was relied upon only for the purpose of discerning general price trends, and not for the specific day-to-day pump prices upon

[9] Hanson's argument that the full amount of his damages over the entire life of the conspiracy were not ascertainable until he went out of business can be rejected out of hand. What this argument implies is that efficient and hard-working independent dealers who make a profit despite illegal conspiracies directed against them have no remedy, but incompetents who are forced out of business can recover, trebled, all losses ever suffered.

which Hanson wanted to rely. The trial judge's determination that the day-to-day prices in the survey had not been shown to be reliable was proper grounds for his excluding the evidence.

Hanson also sought to introduce the survey to show that Shell's and Standard's pricing paralleled each other. As we have seen, even if Hanson could establish closely parallel pricing patterns between the two brands, in an industry where prices are likely to be similar, such evidence does little to establish an illegal conspiracy. Thus, exclusion of evidence which would show parallel pricing would be harmless to the plaintiff. Moreover, we have held that the trial court properly directed a verdict in favor of Shell on the issue of vertical retail price maintenance. If Shell did not control the retail price at which its dealers sold gasoline, evidence of the retail price would show nothing material about Shell's behavior. Thus, because of Hanson's failure to show that the suppliers controlled retail prices, excluding evidence of retail prices was also harmless.

VII. *Summary.*

We hold that the trial court properly directed a verdict for Shell on the Sherman Act § 1 charge of vertical combination in restraint of trade and § 2 charge of attempt to monopolize. We also hold that the trial court acted well within its discretion in granting a new trial on the Sherman Act § 1 horizontal combination in restraint of trade and § 2 conspiracy to monopolize charges. We further hold that, although the instruction on the statute of limitations during the second trial was in error, the error was harmless. Finally, we hold that the trial court properly refused to admit the Lundberg Survey in evidence.

Affirmed in all respects.

WRIGHT, Circuit Judge, concurring:

I concur, but would prefer to dispose of the appeal on the basis that the plaintiff in this private antitrust action should fail because he has not established the necessary "reasonable probability" of some causal connection between the defendant's wrongful act and some injury to the plaintiff. *Flintkote* v. *Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957). *See also Pacific Coast Agricultural Export Ass'n* v. *Sunkist*, 526 F.2d 1196, 1205-06 (9th Cir. 1975); *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972); *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 52 (9th Cir. 1971).

APPENDIX B

District Court's New Trial Order

On February 19, 1971, Judge Walsh ordered a new trial, stating as follows:

> I have concluded, after the benefit of the briefs and reviewing the record, having the benefit of counsel's argument, that . . . I must grant the Motion for a New Trial.
>
> The bases [sic] for granting the Motion for New Trial are that I have come to the conclusion that the verdict finding the existence of either a conspiracy between the defendants to fix prices to their dealers in Tucson, or a conspiracy to monopolize the sale of motor gasoline in the Tucson area is against the clear weight of the evidence in the case. And I conclude further, assuming the finding of the jury of a conspiracy, the finding of the jury that the result of that violation was the proximate cause of damage to the Plaintiff, that that, insofar as the verdict implies that finding, the verdict is contrary to the weight of the evidence.
>
> Further, I have concluded that I erred substantially in admitting, over the defendants' objections, certain evidence in the case.
>
> The first item is Plaintiff's Exhibit 362-B, the 11-month operating statement which covered a part of the Plaintiff's business. Looking back, I can't understand myself why I, with two like documents, sustained objections to them repeatedly on the basis that it was an attempt to fragment Plaintiff's business, and it was misleading, and yet I did not go back and strike out this one. I feel it was a substantial error, and it was very misleading to the jury because, contrary to the fact, it represented or purported to show that the Plaintiff had derived

very substantial profits, if you add the two figures together, from his business in the year 1962.

The other evidence that should not have been admitted, and it should have been stricken, even after admission, was the testimony of Mr. Hanson that \$1.00 times the monthly station gallonage was a proper element to be included in valuing his business as a good will or going concern value. There was an objection to it, and the objection should have been sustained.

But when Mr. Hanson further testified as to the basis for his testimony, that he had some hearsay testimony that some oil company had been—circumstances that he didn't know too much about—used this formula, then I think it was very evident that this was a personal valuation on the part of Mr. Hanson, and it should not have been received into evidence.

The next basis which motivates me to grant the motion for a new trial is that I find that the damages awarded by the jury are excessive. The Plaintiff has taken the position in his brief that the jury did not include any loss to profits or any going business value elements in returning this verdict; but that they based the verdict entirely on Plaintiff's Exhibit 372-G, and I think if you were going to search to see if you could come up with some basis or reason for the jury's verdict in the amount that they gave it, this might be the closest you could come to it under the evidence in the case.

However, if this is correct, then it is obvious that the jury did not follow on the Court's instruction with respect to damages, if they selected this alternative as the measure of damages. The Court's instruction in this regard was very specific, and it

stated, another method of computing damages, and you must remember that this is an alternative method and not a supplemental or additional method of computing damages, is to determine the value of Plaintiff's business; that is, you may consider what the fair market value of Plaintiff's business, including his fixed assets, but after deducting the encumbrances, indebtedness and other liabilities of the business was as of approximately January 1, 1965, and what the fair market value of the same was as of July, 1966.

Now, this is the clear instruction of the jury that they are to do it this way.

On January 1, 1965, according to the Plaintiff's own testimony, he owed at least, he owed business debts of at least \$100,000, yet there is no deduction of this amount from the award value, if we say that the jury used 327-G (sic). And it is, I think, idle to say that the jury was not required to deduct this \$100,000 because it was borrowed by the Plaintiff from his family and his friends, his testimony was, and he answered the Interrogatory the same. He invested that in the business. And it was a business debt that the business owed.

Further, if this is the methods [sic] that the jury used, the value of the fixed assets, it appears clearly in the evidence that Mr. Hanson himself questioned the validity of 372-G, and in fact, he gave sworn testimony which is in, I believe it is 516, Plaintiff's 516, the computation that Mr. Furth put on the board, he gave sworn testimony to values as of January 1, 1965, which are different from 372-G and which are some \$67,000 lower than the values shown in 372-G. So that actually if the jury reached the damages or found the damages on the basis of the

valuation of these assets, the valuation or the verdict is in excess by approximately $167,000, which is virtually half of it, without any question as to what other business indebtedness there was.

And in that regard, I question the validity of the instruction in light of the fact that the Plaintiff hadn't established what his business debts were; and yet the Court instructed the jury to deduct those without them being definitely stated. The jury could only speculate.

But as far as the verdict is concerned, if it is based on the value of fixed assets, it is, in my judgment, virtually, at least double the amount of the evidence that there was to show those values.

Of course, we are talking again about treble damages. So if we have an allowance that is excessive by $167,000, when you get through with the treble damages, we are talking about virtually half a million dollars.

So I think this, the verdict, is excessive.

If it is contended that there is someplace in the—maybe the jury didn't do that—that they took into account some fair value or going concern value, I should say, or goodwill, in my judgment there wasn't any evidence in the record to support such an instruction or such an element.

Actually, the instruction that I gave that they might compute the damages by determining the value of the Plaintiff's business was error, I think, in view of the fact that the jury was required to deduct business indebtedness; yet there was no definite proof except that there was business indebtedness, but the Plaintiff was not required at any time to produce proof of the amount of that business in-

debtedness. We know it was $100,000 because he said when he that [sic] he still owed $100,000 of business indebtedness to his family and friends at the time of the deposition, and I think even at the time of the trial. But there were clearly other indebtednesses in the business, and I think if the Court was to have given this instruction properly there should have been, the plaintiff should have been required to establish the amount of that indebtedness so the jury wouldn't speculate, but would have definite, concrete figures to go by.

In any event, even if the instruction could have been given at all, it was erroneous in the form that it was given because it implied that the jury could find a going value or a goodwill value of the business whereas the evidence didn't support any such finding. And as a matter of fact, the Court was questioned by the defendants to respectfully instruct the jury to that effect, and the Court refused to do so. But on reconsidering the matter, I feel that I should have definitely given the jury the instruction that the evidence in the case would not support a finding of a going value or goodwill value (Transcript of February 19, 1971, at 3-8).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 69-145 Tuc.—JAW

C. O. Hanson,
Plaintiff,
vs.

Gulf Oil Corporation, Shell Oil Company and Standard Oil Company of California,
Defendants.

[Filed Sept. 11, 1973]

ORDER AND FINAL JUDGMENT PURSUANT TO RULE 54(b), FED. R. CIV. P.

Each and every claim and issue in the above-entitled action presented by the complaint herein against the Shell Oil Company ("Shell") having now been resolved in Shell's favor, and the last outstanding claims and issues having been tried separately to a jury which returned a verdict for Shell on November 22, 1972; and it being expressly determined that there is no just reason for delay and expressly directed that final judgment upon said claims and issues be entered, it is

Ordered, Adjudged and Decreed:

(1) That plaintiff take nothing by his complaint against Shell, and that Shell have and recover its costs of suit in the amount of $12,634.94 as taxed by this Court's Judgment Order of January 5, 1973;

(2) And further, this Court, expressly determining, under Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in entering final judgment in Shell's favor, hereby expressly directs that final judgment dismissing plaintiff's claims against Shell be entered; and the same hereby is entered.

It is so Ordered this 11th day of September, 1973.

JAMES A. WALSH
United States District Judge

Judgment entered.
W. J. Furstenau, Clerk
By: Louise Clelland, Deputy Clerk

September 11, 1973.

APPENDIX D

Statutory Provisions Involved

1. Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, provides in pertinent part:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

2. Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 2, provides in pertinent part:

   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.

3. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides in pertinent part:

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

4. Section 4B of the Clayton Act, as amended, 69 Stat. 283, 15 U.S.C. § 15b, provides in pertinent part:

   Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Federal Rules of Civil Procedure

5. Rule 61, Fed.R.Civ.P., provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.